Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1815

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FRANK CASTRO, JR.,

Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Mr. Wayne L. Hanold, Counsel of Record
Mr. David R. Aplington
WESTERVELT, JOHNSON, NICOLL & KELLER
1400 First National Bank Building
Peoria, Illinois 61602
(309) 671-3550

Mr. O. L. Houts, General Solicitor
Chicago, Rock Island and Pacific Railroad Company
332 S. Michigan Avenue
Chicago, Illinois 60604
Of Counsel
Attorneys for Respondent

Mr. John T. Pierce, Jr.
Paul L. Pratt, P.C.
Route 111 at Airline Drive
P.O. Box 179
East Alton, Illinois 62024
(618) 259-8011
Attorneys for Petitioner

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

QUESTION PRESENTED FOR REVIEW

In a Federal Employers' Liability Act case, 45 U.S.C., § 51, et seq., was the Supreme Court of Illinois correct in affirming the trial court's decision to dismiss Petitioner's claims, because no genuine and material question of fact existed.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	ii
Statement of the Case	1
Summary of Argument	3
Reasons for Denying Writ	3
Conclusion	6

TABLE OF AUTHORITIES

Cases

Chesapeake and Ohio Railway Company v. DeAtley, 241 U.S. 310, 316-17 (1916)	3
State of Missouri ex rel. Southern Railway Company v. Mayfield, 340 U.S. 1, 3-5 (1950)	3
Taylor v. The Southern Railway Company, 350 Ill. 139, 145-46, 182 N.E. 805 (1932)	3
Brant v. The Chicago & Alton Railroad Company, 294 Ill. 606, 128 N.E. 732 (1920)	4
Atlantic Coast Line Railroad Company v. Mims, 242 U.S. 532, 535 (1917)	4
Amos v. The Pullman Co., 236 F.2d 666 (D.C. Cir. 1956)	5
Dillard v. Thompson, 5 F.R.D. 26 (W.D.La. 1945)	5
Rohner v. Union Pacific Railroad Company, 225 F.2d 272 (10th Cir. 1955)	5
Pena v. Southern Pacific Transportation Co., 555 S.W. 2d 184 (Tex. App. 1977)	5

Statutes

	Page
Illinois Revised Statutes, ch. 110, §48	1
Federal Rule of Civil Procedure 12	2

No. 80-1815

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FRANK CASTRO, JR.,

Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Chicago, Rock Island and Pacific Railroad Company, Respondent, submits this brief in opposition to the Petition for Writ of Certiorari filed by Frank Castro, Jr., Petitioner.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari omits certain facts crucial to the decisions below. Those facts are set forth herein, and are fully supported by the opinion of the Illinois Supreme Court below. (Petitioner's Appendix, A-31 to A-32, referred to herein as "Appendix.") This cause arose out of Respondent Railroad's motion under Section 48 of the Illinois Civil Practice Act.*

*Section 48 is set forth at page 3 of the Petition.

Section 48 permits the defendant to move to dismiss the complaint by presenting affidavits raising factual matters. In its opinion below, the Illinois Supreme Court stated that a section 48 motion:

> shall be denied if a "material and genuine disputed question of fact is raised * * * if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time." (Ill. Rev. Stat. 1977, ch. 110, par. 48(3).) Thus, in all civil cases, including those brought under FELA, the court cannot decide material and genuine disputed questions of fact when a jury demand has been appropriately filed. Contrary to the plaintiff's argument, section 48 protects his right to trial by jury.

(Appendix, A-33.) In the instant case, Respondent filed affidavits setting forth Petitioner's release of his claim. (Appendix, A-10 to A-23.) Section 48 permits the opposing party to file affidavits in opposition to the motion. (Section 48(3).) The Illinois procedure under Section 48 is not unlike the procedure contemplated by Rule 12(b) and 12(c) of the Federal Rules of Civil Procedure. Rule 12 permits the court to treat a motion raising factual matters as a Rule 56 motion for summary judgment.

In response to Respondent's section 48 motion, Petitioner filed a Motion to Strike in which he argued that section 48 is not applicable in a case arising under the Federal Employers' Liability Act. (A-31 to A-32.) No affidavits were filed by the Petitioner in opposition to the motion. The court granted Respondent's Motion and dismissed Counts I and II of Petitioner's complaint. Thereafter, in May of 1978, Petitioner filed a Motion for a rehearing of the court's order dismissing Counts I and II. The motion requested that the motion be reheard or in the alternative that Petitioner be permitted to dismiss Count III of his Complaint and file a notice of appeal. Petitioner did not file affidavits with his Motion for Rehearing, and the court denied the Motion.

On March 13, 1979, approximately one full year after the trial court's original ruling on Respondent's motion, and approximately ten months after the court's denial of the Motion for Rehearing, Petitioner filed a second Motion to Reconsider the trial court's ruling. In support of that motion, Petitioner attached his affidavit, in which he admitted that he executed releases of his claims, as alleged by Respondent's affidavits. Petitioner stated affirmatively, however, that it was his understanding that the releases were solely for the purposes of receiving lost wages. Respondent filed a motion to strike Petitioner's affidavit because the affidavit set forth only conclusions unsupported by allegations of specific facts; because the conclusions in the affidavit did not support a mutual mistake of fact, and a unilateral mistake of fact is insufficient to avoid a release; and because the trial court had ruled on the issue on two previous occasions. The Motion to Reconsider was denied by the trial court and an appeal followed.

SUMMARY OF ARGUMENT

Petitioner failed to comply with state procedural requirements, and the state trial court properly dismissed his claim. The decisions below were consistent with well established federal case law.

REASONS FOR DENYING THE WRIT

Although federal substantive law applies in an FELA case, black letter conflicts of law principles hold that the forum court applies its own rules of procedure. *Chesapeake and Ohio Railway Company v. DeAtley*, 241 U.S. 310, 316-17 (1916). Thus, in the trial court below, Illinois procedural law controlled. Both federal courts and Illinois courts have held that the procedural rules of the state court govern in FELA actions brought in a state court. *Id.* at 316-17; *State of Missouri ex rel. Southern Railway Company v. Mayfield*, 340 U.S. 1, 3-5 (1950); *Taylor v. The Southern Railway Company*, 350 Ill. 139, 145-46, 182 N.E.

805 (1932). The Supreme Court of Illinois had previously decided the issue in *Brant v. The Chicago & Alton Railroad Company*, 294 Ill. 606, 128 N.E. 732 (1920), citing this Court. In *Brant*, the defendant railroad failed to follow a state procedural rule, and the court upheld a judgment against defendant. The *Brant* court held, citing this Court:

> Under the practice in this state Plaintiff in error is bound by that finding, and we think that under the ruling of the Supreme Court of the United States in Atlantic Coast Line Railroad Co. v. Mims, 242 U.S. 532, 37 Sup. Ct. 188, 61 L. Ed. 476, it is also bound, under the rules of that court, by these special findings. That court recognizes the doctrine that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice; yet it holds that such a right or defense must be asserted at a time and in such manner in the state court as will entitle the defendant to a consideration of such right or defense by the state court under its established system of practice and pleading.

128 N.E. at 736, 294 Ill. at 616.

In *Atlantic Coast Line Railroad Company v. Mims*, 242 U.S. 532, 535, this Court had specifically held that a federal right or claim "must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice." The *Mims* holding and rationale are directly on point in the present case. Contrary to the rulings of this Court and the Illinois courts, Petitioner did not follow Illinois procedural rules. He had the opportunity to submit affidavits in opposition to Respondent's motion, but failed to do so. Thus, no material and genuine disputed question of fact was raised at the hearing on Respondent's motion to dismiss. In such a case, the court's decision to dismiss the Complaint and enter judgment against Petitioner was proper.

The Illinois court's decision below parallels the federal procedure. The federal courts do not always require submis-

sion of an FELA case to a jury, but rather, permit decisions by the trial court as a matter of law. *Amos v. The Pullman Co.*, 236 F. 2d 666 (D.C. Cir. 1956), *cert. den.* 352 U.S. 847, is on point, and refutes Petitioner's argument. In *Amos* the defendant moved for summary judgment on the basis of an "uncontroverted affidavit" of an employee of defendant. Thus, the facts and procedure were closely analagous to the instant case. On appeal, the appellate court stated:

> The District Court granted appellee's motion for summary judgment on its view that the uncontroverted affidavit of appellee's vice-president established that appellee was not a "common carrier by railroad". On this appeal appellant insists that whether or not appellee is subject to the Federal Employers' Liability Act remains a genuine issue of material fact and must therefore be tried. We think the District Court was clearly right.

Thus, the *Amos* court permitted a summary judgment in favor of defendant where defendant's affidavits established that no genuine issue of material fact existed. See also *Dillard v. Thompson*, 5 F.R.D. 26 (W.D. La. 1945); *Rohner v. Union Pacific Railroad Company*, 225 F. 2d 272 (10th Cir. 1955). In *Rohner*, plaintiff's case was dismissed on the face of the pleadings, just as Petitioner's claim was dismissed herein.

The procedure in the instant case was consistent with federal decisions. Moreover, neither in this Court nor below has Petitioner cited any case prohibiting the procedure. Courts in other states have approved the same procedure. *See, e.g., Pena v. Southern Pacific Transportation Co.*, 555 S.W. 2d 184 (Tex. App. 1977). Because Petitioner elected not to file affidavits in opposition to Respondent's motion, no genuine and material disputed issue of fact existed when the trial court dismissed Counts I and II. Moreover, the affidavit eventually filed by Petitioner was not only untimely, but insufficient. (Opinion of the Supreme Court of Illinois, A-34 to A-35.) Therefore, the trial court properly dismissed Counts I and II, and no federal

question is presented before this Court. The decision below is consistent with established federal precedent. Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

CONCLUSION

Wherefore, for all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Mr. Wayne L. Hanold, Counsel of Record
Mr. David R. Aplington
WESTERVELT, JOHNSON, NICOLL & KELLER
1400 First National Bank Building
Peoria, Illinois 61602
(309) 671-3550

Mr. O. L. Houts, General Solicitor
Chicago, Rock Island and Pacific Railroad Company
332 S. Michigan Avenue
Chicago, Illinois 60604
Of Counsel

Attorneys for Respondent